

***Uti Possidetis* and the Ethiopia-Eritrea Boundary
Dispute**

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Foreword

Uti possidetis, as can be gathered from a number of boundary disputes, has been one of the major international law principles invoked for controversies among states over land territory. For better or worse, this same principle has been used for Eritrea-Ethiopia boundary dispute--a dispute that had already resulted in a territorial war between these countries. The consequences of its use, which started with a boundary decision with no apparent hope of implementation, will be judged in the future. But at present there are concerns to be addressed as to the wisdom of using the doctrine.

I am really grateful to my advisor, Ole Kristian Fauchald (Pro.), for his critical comments throughout my work on this paper. His contributions, all the way from the outline to the recommendations, have been enormous.

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Table of contents

<u>1</u>	<u>INTRODUCTION</u>	<u>1</u>
1.1	Purpose of the Paper	1
1.2	Structure of the Paper	2
1.3	Methodology	2
1.4	Limitations of the Paper	3
1.5	Background to the Territorial Dispute between Ethiopia and Eritrea	5
1.6	Eritrean Secession and the Territorial Dispute	7
1.7	The Present State of the Dispute and the Boundary Commission	9
<u>2</u>	<u>UTI POSSIDETIS AND INTERNATIONAL LAW</u>	<u>11</u>
2.1	Introduction	11
2.2	Origin and Development of <i>Uti Possidetis</i>	11
2.2.1	Historical Background and Development of <i>Uti Possidetis</i>	11
2.2.2	<i>Uti Possidetis De jure / De facto</i>	16
2.2.3	The Critical Date	18
2.3	<i>Uti possidetis</i> in Africa, during Decolonization and beyond	19
2.4	<i>Uti possidetis</i> under International Law	24
2.5	Recent Interpretation of <i>Uti Possidetis</i>	25
2.6	Criticisms of <i>Uti Possidetis</i>	28

<u>3</u>	<u>UTI POSSIDETIS IN THE TERRITORIAL DISPUTE BETWEEN ETHIOPIA AND ERITREA</u>	<u>33</u>
3.1	Introduction	33
3.2	<i>Uti possidetis</i> to Ethiopia-Eritrea Dispute	33
3.2.1	The Background to the Algiers Agreement	33
3.2.2	The Algiers Agreement	38
3.2.3	<i>Uti Possidetis</i> : Custom or Clause in the Algiers Agreement?	41
3.3	The Challenges against <i>Uti Possidetis</i> in Ethiopia-Eritrea Boundary Dispute	42
3.3.1	Secession and <i>Uti possidetis</i>	43
3.3.2	The Colonial Treaties and <i>Uti Possidetis</i>	44
3.3.3	<i>De facto</i> / <i>De jure</i> <i>Uti Possidetis</i>	46
3.3.4	The Critical Date	48
3.4	Conclusion	49
<u>4</u>	<u>RECOMMENDATIONS</u>	<u>51</u>
4.1	Introduction	51
4.2	The Relevance of <i>Uti Possidetis</i> for Territorial Disputes	51
4.3	Alternatives to <i>Uti possidetis</i>	52
4.4	Contextualization of the dispute	54
4.5	Informed Decision	56
4.6	Identifying the Real Problem	56
<u>5</u>	<u>BIBLIOGRAPHY</u>	<u>58</u>

1 Introduction

1.1 Purpose of the Paper

When I set out to write about the territorial dispute, I thought of evaluating the work of the Boundary commission, an *ad hoc* commission established for resolution of the boundary dispute between Ethiopia and Eritrea. That I thought was too ambitious under the circumstances and sought for a point or two in the work of the Commission. When I considered the work of the Commission, I saw a legal principle, which I considered to be a handcuff put on the Commission, which, contrary to the present deadlock, could and would have rendered an acceptable and permanent solution for the dispute. That handcuff, noticeable throughout the work of the Commission, was set in the Algiers Agreement, which created and empowered the Commission. It is the international law principle of *uti possidetis*. It is crowned in the Agreement as the principle that the Commission shall use for arbitration of the dispute. Then I started inquiring whether the parties have made a wise choice with regard to this principle. It is the answer for this inquiry that forms the purpose of this paper.

Normally, as outlined in the relevant literature, there are three stages for boundary disputes: setting the rules, delimitation and demarcation. The first stage is preparation stage consisting of formulation of the principles applicable to the actual delimitation; the second, the decision stage concerning the delimitation itself; and the last one is the execution stage consisting of transcribing the delimitation onto the territory in question.¹ In Ethiopia-Eritrea case the first stage constitutes the Algiers Agreement that set the legal rules, the second and third stages being the Commission's delimitation decision and the demarcation work yet to be carried out. This paper deals with the first stage by which the principle of *uti possidetis* is provided. Exploration of the delimitation decision of the Commission, the

¹ Shaw, Malcolm(1986) *Title to Territory in Africa, International Legal Issues*, p 227

second stage, and the actual line to be drawn on the basis of that decision, assuming that the decision will be executed, the third stage, is not part of the inquiry of this paper. Simply put, after discussing *uti possidetis* in terms of its origin and status under international law, the paper will aim at the questioning of the relevance and adequacy of this principle to the Ethiopia-Eritrea boundary dispute.

1.2 Structure of the Paper

Obviously, the issues associated with Ethiopia-Eritrea boundary dispute are clearly understood in historical context. As a result, before setting out arguments in support of the thesis, the paper, in the first chapter, introduces to the reader a brief history of the relationship between Ethiopia and Eritrea including the question of Eritrean secession. In this same chapter, the present territorial dispute is explained with the Boundary Commission that has been playing significant role in the present state of the boundary dispute. The account of these introductory points is given in the last three sections after the presentation of the limitations and methodology used in the writing of the paper. In the second chapter, the territorial principle of *uti possidetis* is discussed in terms of origin, meaning and development under international law as well as African context. As groundwork for subsequent chapters, criticisms against the principle are outlined. In the third chapter the principle's application to Ethiopia and Eritrea is evaluated after a brief account of events and sources that contributed to the application of the concept to Eritrea-Ethiopia border dispute. In the fourth chapter, forming the final chapter of the thesis, recommendations are given by the writer, including a glimpse of alternative legal principles.

1.3 Methodology

The work entirely depends on library materials: books, journal articles, cases, resolutions, treaties, declarations, etc, printed or electronically supplied. Since the paper does not deal with actual lines of boundary, there was no need for me to inquire into facts on the ground. Since the paper more or less deals with the initial stage of setting legal rules, statistical

analysis and geographical data such as maps are barely used. Instead writings of scholars, judgments of international tribunals, treaties and resolutions by international organs form the prime sources of information presented. While the second chapter is mainly based on books and journal articles, decisions by international tribunals, especially the International Court of Justice (ICJ), play a substantial role in serving as authoritative sources.

For the parts that deal with Ethiopia and Eritrea, mainly chapter three, I have avoided the use of sources from both countries unless the sources restate findings by international organs or alternatively the facts to my knowledge are undisputed. I have done this for the sake of objectivity, which will be lost if those sources, which are full of rhetoric, are used. So the findings of the Boundary Commission, for example, irrespective of the Commission's acting upon them, press statements by neutral States, and reports presented by Organization of African Unity (OAU) are used. Resolutions, especially of the OAU, have also been important materials in tracing the origin of *uti possidetis*.

1.4 Limitations of the Paper

There are several limitations inflicting the paper. They are mainly caused by the intricacy of the border and associated issues between Ethiopia and Eritrea. I will identify some of the problems involved and admit that my paper does not in any way, expressly or implicitly, answer those issues. The first is the issue of Eritrean secession. It is sometimes asserted that the legality of Eritrean secession must be determined before any decision as to frontiers of the two countries. The Eritrean secession in 1991 may or may not be challenged on legal or political grounds. But my paper, apart from the relationship between Eritrean secession and *uti possidetis*, does not go into the legality of Eritrean secession. My paper's inquiry begins from where the relations of the two countries stand today, mainly in the eyes of the United Nations (UN). Another related limitation is a contention that there are still, aside from the present territorial dispute, unresolved issues of Eritrean secession such as Ethiopian traditional access to the sea through Eritrean ports and inland territory, and that these issues must be considered with the territorial dispute. I should say the same thing: the paper does not attempt to argue for or against such kinds of claims which, if supported by the current

state of international law, may be put forth. Arguments ranging from the reunification of Eritrea to the claim of land territory allegedly occupied by people who are presently in Eritrea but do not wish for independent Eritrea in summation with arguments on the bases of natural prolongation, historical claims and self-determination may be presented. They may or may not stand a chance before international law. But one thing, this paper does not show the writer's stand towards those issues.

Another limitation is that the paper does not provide comprehensive arguments for alternative principles. Since these alternative principles can occupy research themes by themselves, I have no choice but enumerate those principles with generalized statements for their application. For this understandable reason, the paper, other than showing the existence of options, should not be expected to serve well for forwarding defensible alternative principles for the border dispute.

The other limitation is due to shortage of time, the restriction on the size of the paper, and for the sake of avoiding distractions from the subject of the thesis, I have assumed or disregarded certain facts (or issues) or have taken one or two authorities for their assertion. Issues falling under this limitation include: whether Eritrea's secession (from Ethiopia) is related to colonialism, analysis of custom formation of *uti possidetis*, meaning of colonialism, relevance of self-determination for cases of territorial disputes caused by secession, the significance of UN Resolution (that incorporated Eritrea with Ethiopia) to the dispute, and whether the treaties between Ethiopia and Italy constitute "colonial" treaties for the application of *uti possidetis*.

To inform the reader of facts on the ground, some kind of geographic indications, names, etc would have been preferred. But as I noted previously, the paper is not about delimitation or demarcation which might have necessitated identifying places. Rather it is about the principle for delimitation and demarcation. For this reason my failure to mention the name of the town of Badme, the spotlight of the dispute, should not obscure the purpose of the paper in search for a stable solution for territorial disputes.

Last but not least is the paper's lack of stance on the legality or otherwise of Ethiopia's refusal (or position) towards the delimitation decision of the Boundary Commission. This issue as well deserves extensive research of international law and circumstances surrounding the treaties, the delimitation decision and the demarcation phase. This in turn requires enormous amount of time, energy, and space, which the writer does not at the moment have.

1.5 Background to the Territorial Dispute between Ethiopia and Eritrea

The relationship between Ethiopia and Eritrea stretches long before the appearance of colonialism in the African continent. Shared language, culture and history among the peoples of these countries are testimonies to this fact. Setting aside the ancient historical and cultural relationship, as early as the 14th century at least parts of the present Ethiopia and Eritrea fell within the same administration.² A drastic change in the relationship between these countries, or rather peoples that lived in the area presently identified by these countries, was brought by Italy's establishment of the colony of Eritrea in 1890.³ The territory forming the colony of Eritrea was obtained by different means such as private acquisition, "good offices" of Britain, force, and cession by Ethiopia.⁴ Throughout Italy's colonial presence in Eritrea, much of the relationship between Italy (the colony of Eritrea) and Ethiopia was shaped by the colonial aspiration of Italy towards Ethiopia and in general East Africa.⁵ During this colonial time, several treaties were concluded between Italy and Ethiopia, amongst them are the treaties of 1900, 1902, and 1908. These treaties were concluded with the purpose of delimiting the boundaries of Ethiopia and the colony of Eritrea.

² Negash, Tekeste and Kjetil Tronvoll (2000), *Brothers at War: Making Sense of the Eritrean-Ethiopian War*, p 6

³ Ibid, p 5

⁴ Zewde, Bahru (2002) *A History of Modern Ethiopia: 1855-1991*, 2nd ed., pp 56, 84

⁵ Ibid, pp 150-160

Due to its colonial expansionist policy at the time, Italy was not content with its Eritrean colony. In 1935 Italy launched an invasion of Ethiopia; and after extensive war Italy, by 1936, occupied Ethiopia.⁶ This occupation lasted for 5 years, by which time Italy was driven out, as part of the victory in the WW II, from both Ethiopia and Eritrea.⁷ After liberation, Eritrea continued to be administered by the British until a decision was made regarding the fate of Eritrea.⁸ Many alternatives were presented, typical of them being granting independence to Eritrea and unification with Ethiopia. At last the UN General Assembly decided for the federation of Eritrea with Ethiopia.⁹ Factors considered to reach the decision were:

- (a) the wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government;*
- (b) the interests of peace and security in East Africa ;*
- (c) the rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea.*¹⁰

After the federation of Eritrea with Ethiopia, several events occurred. These included on the Ethiopian side the abolition of the federal structure and the unilateral nullification of the treaties concluded with Italy.¹¹ The formation of Eritrean “liberation” movements, with the agenda of forming an independent state of Eritrea, was another event. Most important development of all was the secession of Eritrea, which brought out issues of boundary between Ethiopia and Eritrea

⁶ Ibid, p 162

⁷ Ibid, p 176

⁸ Shaw, p 117

⁹ Ibid, p 118, 119

¹⁰ Ibid , p 119

¹¹ Eritrea - Ethiopia Boundary Commission Decision Regarding Delimitation of the Border between the State of Eritrea and The Federal Democratic Republic of Ethiopia, April 2002, p 12

1.6 Eritrean Secession and the Territorial Dispute

Generally, secession, defined as “the action of breaking away or formally withdrawing from an alliance, a federation ... etc,”¹² has been claimed in almost all parts of the world. Irrespective of the affirmation or denial that secession right exists under international law, few secessionist movements, mostly with covert help from states or other units having geopolitical interest in the area, fought a bloody war and managed to form their own independent states. This fact is simply a manifestation of the assertion that “...disintegration and by implication *secession* too were matters of fact, not law.”¹³ (Emphasis added). As it has been the case in international relations, the international community was left with nothing but to recognize the newly formed unit as a state. Victory has always guided the course of international relations. The case of Eritrean secession from Ethiopia is a good illustration of the factual nature of secession.

As the story goes, Eritrean ‘liberation’ movements, mostly in collaboration with other ‘liberation’ fronts in Ethiopia, started a war of secession and, after three decades, took control of Eritrea, a fact mostly related to the dictatorial rule prevailed at the time and the disgruntlement of all the peoples of Ethiopia. With assent from ‘liberation’ movements that came to control the rest of Ethiopia, Eritrea became a *de facto* independent state by 1991.¹⁴ In 1993, it became member of the United Nations.¹⁵

For the international community, the secession and thereby the formation of the Eritrean state was a relief for it seemed to have ended, once and for all, the long lasting civil war between the authoritarian governments of Ethiopia on the one side and the Eritrean ‘liberation’ movements on the other. Territorial issues inherently associated with such kind of secession, socio-economic problems likely to arise and other legitimate interests were

¹² Martin, Elizabeth A. (editor) *Oxford Dictionary of Law*, 5th ed

¹³ Dahlitz, Julie (ed., 2003) *Secession and international law, conflict avoidance-regional appraisals*, (by Judge Rosalyn Higgins, self-determination and secession) p 36-37

¹⁴ Delimitation Decision, p 12

¹⁵ Ibid

not in the minds of the global community. This lack of interest may be attributed to the fact that the rulers of the two countries were ‘related’; their governments were interdependent; and most important, these leaders were considered to be from the “new breed of African leaders” having the magic of settling any dispute that comes in their way. It may also be that there were other overriding concerns to the global community.

But to the peoples of these countries and for those who cared about their relationship, the territorial, social and economic problems connected with the separation were there waiting to explode. The problems of the separation did not wait too long to surface, though it was sooner than most expected. For a conflict to arise, according to observers, it would take the leave of one of the leaders from the political scene. To observers’ surprise, however, both leaders were at the peak of their authority when they started accusing each other of border infringements, which occurred as early as August 1997.¹⁶ For lack of transparency and for rampant unfounded statements and accusations against one another, it may be difficult to identify the exact duration of the main course of the war and the circumstances that triggered it.¹⁷ But according to the Claims Commission, the armed conflict began in May 1998 and formally ended on December 12, 2000.¹⁸

Prior to the full blown war, several attempts were made to resolve the dispute peacefully, most notably were the US-Rwanda Peace Initiative and the mediation efforts of OAU. These mediation attempts were not able to forestall the war, owing to the parties’ uncompromising stance regarding certain elements of the dispute. The war resulted in the loss of lives of close to 100, 000 people and the displacement of thousands of innocent civilians, both from the border towns of the conflict and from towns elsewhere due to the unjustified deportation policies pursued by both governments against innocent residents of

¹⁶ Negash, p. 26

¹⁷ The Claims Commission established in the Algiers Agreement for adjudication of claims other than border found Eritrea to be in violation of *jus ad bellum*, making Eritrea responsible for starting the war. Eritrea-Ethiopia Claims Commission Partial Award, *Jus Ad Bellum*, Ethiopia’s Claims 1–8, December 19, 2005. But this may not explain the parties’ conduct and statements after the war has begun.

¹⁸ Eritrea-Ethiopia Claims Commission, Decision Number 1: The Commission’s Mandate/ Temporal Scope of Jurisdiction, August 2001, The Hague.

citizens of the other country.¹⁹ No need of mentioning the property loss that must have been incurred in the “World War I like” war which was full of destruction, brutality and retaliation against one another including civilians and their property.

Many observers forwarded their opinions as to the real cause of the war. Some of them include the need for diversion from internal pressures, diverging economic policies, and ideological differences. Whatever reasons suspected, the territorial issue pending since Eritrea’s secession, as is the case in the official positions of both countries, is at the heart of the will to go to war. After all, secession, which may apparently be invoked on the ground of self-governance, is mostly about territory. As Margaret Moore suggested, in most cases, “territorial dimension” of secession is “vital”.²⁰ This suggests that territorial issue is the real cause for most claims of secession and the ensuing war or hostility. The land subjected to the claim may hold significant economic, social and military advantages. It may also have historical value with which both parties find difficult to part.

The territorial dispute between Ethiopia and Eritrea, a cause for those horrific losses of lives and property, must be seen in light of this side of secession. Issues of territory, which are insignificant in administrative units of a State, become fundamental when a unit of the State secedes and forms an independent State. Eritrea, which was part of Ethiopia, seceded and now became a State on its own. Because of this fact, the issue of Eritrean territory vis-à-vis Ethiopia gained significance. This territorial side of secession and the Eritrean separation should be appreciated to fully understand the territorial dispute.

1.7 The Present State of the Dispute and the Boundary Commission

After the battle was fought and several mediation efforts were undertaken, the parties concluded the Algiers agreement, the boundary provisions of which will be considered

¹⁹ Human Rights Watch on the Border Conflict between Ethiopia and Eritrea (<http://hrw.org/english/docs/2004/01/21/ethiop6983.htm#7>)

²⁰ Moore, Margaret (ed., 1998) *National Self-determination and Secession*, (the Territorial Dimension of Self-determination, by Margaret Moore), p 135

later.²¹ This Agreement, which officially ended the border war, established the Boundary Commission, with the authority to “delimit and demarcate the colonial treaty border” on the basis of *uti possidetis* and colonial treaties. The establishment of a third neutral organ comes as no surprise since the parties were at war and beyond the reach of compromise or any sort of negotiated bilateral settlement. The Commission, composed of five commissioners and located in The Hague, was consented to give final decision on the boundary dispute on the basis of *uti possidetis*.

Since its establishment, the Commission decided on several procedural and substantive matters. As agreed, the arbitration had two phases: delimitation and demarcation of the boundary. The delimitation phase was concluded by the Commission’s delimitation decision delivered on April 13, 2002.²² According to the Commission, it has now moved to the second phase of demarcation.²³

However, this second phase has not progressed because of the fact that the delimitation decision was not welcomed by the Ethiopian government. According to the latter, the Commission’s delimitation decision is against international law and it is difficult, if not impossible, for implementation.²⁴ Instead it invited negotiation between the two parties, which *prima facie* amounted to violation of the Algiers Agreement that stipulated the conclusive nature of the Commission’s decision. Telling from the current stalemate between these countries, the Algiers Agreement and the working of the Commission do not seem to have done much to resolve the territorial issue.

²¹ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Done in Algiers, on the 12th day of December 2000.

²² Delimitation Decision

²³ Eritrea-Ethiopia Boundary Commission Observations, 21 March 2003, no. 3

²⁴ Human Rights Watch

2 *Uti Possidetis* and International Law

2.1 Introduction

As stated in the introductory part, the main thesis of the paper is evaluation of *uti possidetis* for Ethiopia-Eritrea boundary dispute. The application of *uti possidetis* to territorial disputes, as will be discovered, is not novel to Ethiopia and Eritrea. The principle has been used for a number of boundary disputes among states mainly through consent given for its application. But after all what does this concept mean? And what is its status under international arena in general and African continent in particular? Since it has always been an issue as to the exact components of the concept, its suitability, and whether the principle has developed into customary status, the specific application of the concept to Ethiopia and Eritrea would not be meaningful without full understanding of these points.

This chapter, having this concern in mind, aims at elaborating the meaning, elements and challenges of *uti possidetis* under international law with the hope of providing the wider picture of *uti possidetis*. This I do by brief discussion of the origin and development of the doctrine in international relations. Since its use in Africa has had enormous weight for its application to Ethiopia and Eritrea, the doctrine's status in the region is treated independently, followed by its assessment under general international law. At the end, criticisms and challenges directed against the doctrine are outlined.

2.2 Origin and Development of *Uti Possidetis*

2.2.1 Historical Background and Development of *Uti Possidetis*

The term *uti possidetis* was derived from Roman law. It is a short hand for the Roman maxim *Uti Possidetis, Ita Possidetis*, which literally means “as you possess, so you

possess”.²⁵ Applied to property dispute, it empowered a possessor to enjoy the possession of the property until another claimant proved that the right belonged to them. Thus, the primary aim of this doctrine was nothing other than maintenance of the *status quo* until a final settlement was reached. The final outcome of the dispute much depended on the evidence the disputing parties adduced. If the evidence weighed in favour of the possessor, he would retain the right permanently; and if the evidence showed the contrary, the provisional measure of *uti possidetis* would be revoked and the property would be conveyed to the new claimant. The only advantage this doctrine might have accorded the possessor was the procedural benefit that required the other party to carry the burden of proof.

This private law doctrine of *uti possidetis* at later time lent itself to international law. The first manifestation of this doctrine in international affairs was at the time of the Spanish withdrawal from Latin America.²⁶ It was at the beginning of the 19th century that the practice evolved in Spanish America whereby, at the independence of various former colonies of Spain, their boundaries followed the former colonial boundaries.²⁷ This practice manifested itself in a number of bilateral treaties and national constitutions of newly independent Latin American countries.²⁸ In this context of independence of Latin American States, *uti possidetis* can be taken as mainly a concept signifying that “states emerging from decolonization shall presumptively inherit the colonial administrative [or international] borders that they held at the time of independence.”²⁹

While this was the main idea of the doctrine, there are two points that would help us for better understanding of the concept. The first relates to the context of the doctrine’s application, i.e. decolonization. The doctrine was imported to resolve territorial disputes among liberated States, which had been administered by colonial powers. At the time of departure of these colonial powers, the newly independent states had to delimit or

²⁵ Cukwurah, A.O. (1967) *The Settlement of Boundary Disputes in International Law*, P. 112

²⁶ Castellino, Jushua and Steve Allen (2003) *Title to Territory in International Law: a Temporal Analysis*, P11

²⁷ Cassesse, Antonio (1995) *Self-determination of Peoples, a Legal Reappraisal*, p191

²⁸ Ibid

²⁹ Ratner, S., (1996) ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ *AJIL* 90(4), p590

demarcate the territories to which their sovereignty extended. The principle to which they opted was *uti possidetis*. The states that made use of the principle had been administered by same or different colonial powers. In the former case, the boundaries subjected to *uti possidetis* were administrative boundaries that were turned into international ones while in the latter case the international colonial boundaries were transferred to being the boundaries of the new States. In this regard some writers identified two scenarios: the principle's first invocation in Spanish America for past administrative boundaries and its later extension for disputes between Spanish and Portuguese colonies, extending the concept to international boundaries previously administered by different colonial powers.³⁰ This distinction can be argued to have significant implication if we start considering the reasons or bases for marking boundaries. Bases for marking international boundaries (such as war, cession, etc) may not necessarily be bases for administrative boundaries (administrative conveniences such as language, land and population size, etc). However, for our purpose here, whether the principle started applying to Spanish colonies alone first and then proceeded to Spanish and Portuguese colonies or otherwise makes little difference. For one, no meaningful time lapsed to warrant such kind of distinction. And for another, with no appreciable difference, the doctrine extensively applied both to internal administrative and international colonial boundaries.³¹ What mattered was the fact of decolonization.

The second point relates to the substance of the doctrine. *Uti possidetis*, as originally used in Latin America, embraced two aspects: one is the principle that all territories are deemed to have been part of the former administrative divisions of colonial rule and hence no territory would have the status of *res nullius*; and two is the principle that title to a given locality is deemed to automatically belong to the State that took control over the former administrative division.³² By the first principle, *uti possidetis* prevented any future aspiration of acquisition of territory by colonial or other foreign powers. By declaring that all territories of Latin America were parts of the existing administrative units, it effectively

³⁰ Dahlitz, p 273

³¹ Ratner, p

³² Craven, M. C.R.(1995) 'the European Community Arbitration Commission on Yugoslavia' 66 *BYIL*, p386

forestalled eventual claims based on conquest (occupation), which would have otherwise allowed entitlement over vacant territory that existed at the time. This aspect of *uti possidetis* can be said to have accomplished its purpose and gone to history for there is no more unoccupied territory. The second sense of the doctrine empowered the freed people to retain, as independent state, territory that was held by colonial powers as administrative divisions. As can be noted from the literal meaning of *uti possidetis*, this second principle is the direct idea of *uti possidetis*. This is the principle retained of the two original purposes of *uti possidetis*. As will be discovered soon, *uti possidetis* at present time, including the later time of decolonization, refers to the second sense: present possession entailing future possession of territory.

At this point it is important to note the transformation of the doctrine. Unlike most Roman law principles, this doctrine has entered the sphere of international law with substantial change in its meaning. According to Moore, the early scholars of international law adopted the notion of *uti possidetis* but altered it in two critical ways: by changing the scope of application from private land claims to the State's territorial sovereignty; and, most critically, by transforming the provisional status into a permanent one.³³ In the first place the subject of the doctrine totally changed. The issue of private ownership of immovable property (among individuals) was completely transformed into the issue of sovereignty over territory (among sovereign States). From a solution to neighbours in domestic law, it became a basis for acquisition of territory in international relations, with all the implications of such acquisition. The other aspect of the change is the duration of the solution supplied by the doctrine. Unlike the Roman law in which the doctrine provided interim relief pending a judicial decision, the doctrine, under international law, begun to decide the final outcome of the dispute. From interlocutory measure, the doctrine was redesigned to provide a permanent solution. From these changes in meaning one may be tempted to say that the differences outweigh the similarities of the doctrine as used in the two regimes, the Roman law and international law. This seems to be the reason why, Schwarzenberger, referring to *uti possidetis*, commented that the comparison is "more

³³ Cited in Ratner, p593

indicative of the differences between this remedy in Roman law and its application on the inter-state level than of any supposed likeness between these institutions,”³⁴ suggesting that the comparison between concepts in Roman law and international law is not sometimes helpful. But this difference does not alter the facts that the term originated in the Roman law and that still the literal meaning of the concept “as you possess, so you possess” is intact.

Having noted its meaning, a question may be posed as to what motivated the newly independent states to opt for this doctrine on the face of other competing principles for settlement of territorial disputes. The reason was the belief that order could be easily maintained by this apparently simple principle. International order, as can be seen from international documents such as the UN Charter, has been at the heart of international relations. Given the number of territorial disputes at the time, which seemed to exist among almost all adjacent newly independent states, a principle had to be adopted, a principle which maintained peace and order, a principle which pre-empted the possibility of wars. This purpose of *uti possidetis* is eloquently stated by the International Court of Justice (ICJ):

*Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.*³⁵

To maintain order, the instant and natural solution could not be other than *uti possidetis*, a simple rule which required nothing other than *status quo*. It was even said, in the words of US Secretary of State close to the time, “No other principle [other than *uti possidetis*] is legitimate, reasonable or just.”³⁶ Such kinds of statements may be too categorical. But the higher purpose, i.e. order, in mind, the statements are not difficult to comprehend. It should

³⁴ Schwarzenberger, George (1957) *International Law as Applied by International Courts and Tribunals* (3rd ed.) Vol. I, p289

³⁵ Frontier Dispute (Burkina Faso v. Republic of Mali), ICJ Rep 1986, Para 20

³⁶ Cited in Cukwurah, p114

also be noted that, although its success in maintenance of order was not as expected, it arguably reduced the potential conflicts that would have arisen in its absence.³⁷

Let us now inquire into the customary status of *uti possidetis* at the time of its historic application in Latin America in the early 19th century. At the time *uti possidetis* hardly qualified to be custom under international law, except its application on the basis of *pacta sunt servanda*. The constitutions and *compromis* among Latin American countries might have included some reference to the application of *uti possidetis* for territorial disputes. From this fact one may argue that regional custom that recognized the binding nature of the principle was in its early stage of development. However the virtual non-existence of the doctrine in international relations of the rest of the world during the time prevents us from any wider assumption towards the doctrine. To the contrary, a conclusion is warranted that the practice of *uti possidetis* “was at first much less legal than political in its implications.”³⁸

But do we find anything new if we enquire into the status of the concept after its invocation in a number of territorial issues during decolonization in Africa and Asia, and, in a different scenario, in Europe? Are we justified today if we assume that *uti possidetis* is a customary rule in Africa or is binding under international law? This issue will be taken up in the next parts of this chapter. Before we make any assertion, however, two essential points for complete understanding of the concept should be outlined.

2.2.2 *Uti Possidetis De jure / De facto*

Throughout its history in the sphere of international law, *uti possidetis* has had two differing meanings: *uti possidetis de jure* and *uti possidetis de facto*. In the first, legal documents, irrespective of effective possession, determined the location of borders; while in the second, actually possession mattered.³⁹ The discrepancy in the use of the term

³⁷ Castellino, p 194

³⁸ O’Connell, D.P. (1970) *International Law*, 2nd ed, Vol. I, p 426

³⁹ Ratner P. 594

without clearly pointing the exact intention of the parties did result in several legal proceedings. The dispute between Brazil and the neighbouring Spanish colonies that acquired their independence was prime example.⁴⁰ In their dispute with Brazil, some States, which acquired independence from Spain, argued for the establishment of a juridical line, which is the line of *uti possidetis de jure*, while Brazil advocated a factual line, which is the line of *uti possidetis de facto*. In most cases the two lines did overlap and it mattered less which theory underpinned the claims of the disputants. But it happened that those two lines diverged.⁴¹ In the case of divergence, the line of *uti possidetis de facto* seemed to have prevailed in those original proceedings in Latin America. However was it always so?

We can look at the boundary arbitration proceedings between Guatemala and Honduras, a proceeding which also clarified the distinction between the two meanings. According to this proceeding, the rival interpretations of *uti possidetis* were pressed by the two claimants in Guatemala-Honduras Boundary Arbitration of 1933.⁴² Guatemala contended that the doctrine meant *uti possidetis de facto*, which rested on the test of what territory was actually occupied or administered; while Honduras argued that the doctrine meant possession *de jure*, as defined in colonial decrees, documents, etc. In the first, as argued in the case, it did not matter what the colonial power did say and did not say in documents such as maps. What was critical was the factual administration of the boundary. In the second, the documentary definition of the boundary by the colonial power was decisive. Contrary to the parties' claim, the tribunal said that "an examination of the views of eminent jurists failed to disclose such a consensus of opinion as would establish a definite criterion for the interpretation of *uti possidetis*." The holding of the arbitration tribunal was 70 years ago and one may wonder what the situation would be currently. Although some international lawyers suggest that the modern interpretation of the doctrine of *uti possidetis* favours *de facto* possession, there is still doubt as to its exact meaning.⁴³

⁴⁰ O'Connell, p 426

⁴¹ Cassesse, p 426

⁴² Discussed in McEwen, A.C. (1971) *International Boundaries of East Africa*, p29

⁴³ Castellino, p 11

2.2.3 The Critical Date

A solution of some legal proceedings depends upon the most single important date called the “critical date”, which is generally defined as the date after which the actions of the parties can no longer affect the issue.⁴⁴ Likewise, the decision on territorial disputes in which *uti possidetis* involved rests upon the ascertainment of the critical date. With regard to the importance of the critical date for *uti possidetis*, mention can be made from ICJ’s landmark analysis of *uti possidetis*. In its judgment ICJ once stated:

*International law--and consequently the principle of uti possidetis –applies to the new State (as a State) **not** with **retroactive** effect, but immediately and **from that moment onwards**. It applies to the State as it is, i.e. to the ‘photograph’ of the territorial situation **then existing**. The principle of uti possidetis freezes the territorial title; it **stops the clock**, but does **not put back the hands**.*⁴⁵ (Emphases added).

Since *uti possidetis* will not operate without ascertained critical date, cases depending on this doctrine demand determination of this date. And it is out of this necessity that Latin American countries fixed the critical date at the start of decolonization. In their Constitutions and treaties, these countries decided the critical date to be 1810 (in the case of South America) and 1821 (in the case of Central America).⁴⁶ In the decolonization of Africa and to a lesser extent Asia it was decided to choose the departure of the colonial ruler as the critical date after which the physical dimensions of the new state would be considered crystallized.⁴⁷

Once decided, a decision based substantially on agreement of the parties and occurrence of an event leading to the formation of the new states, the critical date will be the time after which the actions of States do not count for the location of their boundaries. In other words, this date will be the date when the *uti possidetis* line, which determines the territory of the new States, is crystallized. The territory that belonged to a certain unit at that date will

⁴⁴ Waldock, C.H.M.(1948) ‘Disputed Sovereignty in the Falkland Islands Dependencies’ *BYIL*, p320

⁴⁵ Frontier Dispute, para 30

⁴⁶ Castellino, p 75

⁴⁷ Ibid, p15

remain with the successor state. Any adjustment after that date will not be valid. Similarly, events before the critical date, events which might have caused redrawing of territory such as cession or occupation, irrespective of their legal or political justification, shall not be challenged. It should be noted, however, that although the doctrine excludes the consideration of past events to the critical date, those events may still be considered “as points of fact” to ascertain the exact location of the boundary on the critical date.⁴⁸

2.3 *Uti possidetis* in Africa, during Decolonization and beyond

Prior to independence, many African political parties advocated an eventual alteration of colonial boundaries to accord more closely with the wishes of local inhabitants.⁴⁹ All-Africa Peoples Conference at Accra in 1958 that approved a resolution in four parts entitled “frontiers, boundaries, and federations” could be illustrative. The third part of the resolution denounced the artificial frontiers drawn by the colonial powers, particularly those which cut across ethnic lines and divided peoples of the same ethnicity, and called for the abolition of or adjustment of such frontiers at an early date.⁵⁰ This denunciation might have been triggered by the perceived or real injustice committed when colonial powers divided the continent with little regard to the peoples’ identifying marks such as language, ethnicity, and culture. As a solution, the Conference proposed another method, as a sole or principal method of redrawing the boundaries of the newly independent States of Africa. The guiding principle, the Conference declared, by which this was to be effected, was “the true wishes of the people”.⁵¹

Over a couple of years, modification of the former attitude emerged. It was displayed at the inaugural summit conference of the OAU, held in Addis Ababa in May 1963.⁵² The vast majority of delegates to this conference emphasized that, whatever might be the moral and historical argument for a readjustment of national boundaries, practical attempts to reshape

⁴⁸ Frontier Dispute, Para 30

⁴⁹ McEwen, p 23

⁵⁰ Touval, Saadia (1972) *The boundary Politics of Independent Africa*, p56-57

⁵¹ Cited in Shaw, p183

⁵² McEwen, p 23

the map of Africa at the time might well prove disastrous.⁵³ Given the duplicity of territorial claims on this and that ground, the leaders had to submit to this modification. Stability, which was to fall apart any time if those territorial claims were entertained, was their prime concern. In the words of ICJ:

*the essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.*⁵⁴

Hence the change of attitude brought the concept of *uti possidetis* to Africa.

The first official appearance of the doctrine might arguably be in the Charter of the OAU by its reference to territorial integrity. Article 2, among others, declares the defence of territorial integrity of member states as one of the principal purposes of the organization. Likewise, article 3 enshrines “respect for the territorial integrity” as the principle driving the association. However, the clause used in the Charter may not necessarily mean *uti possidetis*. The issue of territorial integrity arises after the territory is ascertained on the basis of *uti possidetis* or any other principle; while *uti possidetis* is about determination of territory. Instead the direct assertion of the doctrine was first made in the 1964 resolution passed by Heads of States and Governments (HSG) of OAU in Cairo regarding border disputes. After several preambular recitals of the reasons necessitating the resolution, principally of the dividing nature of border disputes, reality consideration and the principles of the organization, the resolution declared that:

*All Member States pledge themselves to respect the borders existing on their achievement of national independence.*⁵⁵

Although the Latin phrase was not used, this is the resolution’s core statement which can be considered as African *uti possidetis*. The resolution was passed by the overwhelming majority of African States that indicated the existence of consensus on the issue among the participants of the Summit. It was opposed by only two of the member states, Morocco and

⁵³ Ibid, p 24

⁵⁴ Frontier Dispute, Para 25

⁵⁵ OAU Resolution on Border Disputes, 21 July 1964, Cairo

Somalia, which reserved their right to claim territory on the basis of religion, history, or ethnicity.⁵⁶

These are the original facts in connection with the doctrine of *uti possidetis* in Africa. These facts raise two fundamental issues related to *uti possidetis* in the continent. One is, given the fact that the term *uti possidetis* is not used in the document referred, is it possible to say that the border resolution, or other documents with similar wordings, referred to the *uti possidetis* used in Latin America? Two, assuming that the documents referred to *uti possidetis*, has it had any customary status in Africa?

For the first issue, it is widely accepted that the principle provided in the border resolution is the doctrine of *uti possidetis*, albeit the Roman law phrase was not used. In disputes involving African States and the concept of the resolution, writers and international organs, who attempted to discuss *uti possidetis*, with obvious simplicity referred the African resolution as *uti possidetis*. In this regard it is sufficient to mention that ICJ, with no hesitation, declared that the OAU's border resolution referred to *uti possidetis*.⁵⁷ In addition, a mere glance at the definition of the doctrine explained above would tell the same story as that of the resolution.

Proceeding to the second issue, a number of authors attempted to evaluate the customary nature of *uti possidetis* in Africa. Since elaborate analysis of its nature is beyond the scope of this paper, I take two pronouncements on the customary status of the concept, one from writers and one from judicial organs. Brownlie, in his commentary of African *uti possidetis*, analyzed the concept in terms of the resolution and other documents. He first declared that "the resolution as such probably had no binding effect in terms of international law,"⁵⁸ asserting the fact that such kinds of resolutions fall under the category of soft laws. But the status of resolutions does not necessarily coincide with the status of

⁵⁶ Brownlie, Ian (1979) *African Boundaries: A Legal and Diplomatic Encyclopaedia*, p 11

⁵⁷ Frontier Dispute, Para 23

⁵⁸ Brownlie, p 11

obligations embodied in the resolutions. This is reflected in the conclusion Brownlie reaches towards the doctrine. He said:

*In any case the resolution, and the conduct of governments based upon it, provides the basis for a rule of regional customary international law binding those states which have unilaterally declared their acceptance of the principle of the status quo as at the time of independence.*⁵⁹

It should be noted that by this comment, he excludes the application of the doctrine against Morocco and Somalia, which consistently objected the principle's application to Africa or at least to their territorial claims against their neighbours.

Although the writings of scholars such as Brownlie are indicators of the existence or lack of customary rule on a subject, the opinion of ICJ, as the World Court, is sufficient, at least in this case, for determination of the status of the doctrine. In Burkina Faso/Mali case, a case which seems to be cited wherever *uti possidetis* is discussed in present literature, the court had, though *obiter dictum*, commented on the customary nature of the doctrine. The Court stated:

*The numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States[a clause which the court more or less equated with uti possidetis], whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.*⁶⁰

This statement unequivocally asserts the customary nature of the doctrine. Even the Court went further and asserted the doctrine's existence before the Cairo resolution. Unlike ICJ, some writers may not be convinced of the doctrine's existence as custom before the resolution and other 'solemn affirmations of the intangibility of the frontiers'. Nonetheless most agree with the Court on the principle's status in the present day of Africa. It should

⁵⁹ Ibid

⁶⁰ Frontier Dispute, Para 24

also be noted that the application of the concept to Africa is criticized on different counts, especially on grounds of passage of time since the conception of the doctrine and its use in Africa and differences in circumstances of the two regions. But still it “is no longer possible to deny the impact of this rule as a binding practice of African states.”⁶¹

At last it is interesting to note that, after the doctrine was declared as part of customary international law, at least in African continent, by authoritative organizations such as ICJ, the doctrine is inserted in a single most important regional document in Africa. The Constitutive Act of African Union, unlike its predecessor, has a direct statement of *uti possidetis*. Article 4(b) states that the principles of the Union include: respect of borders existing on achievement of independence.⁶² Here it is necessary to briefly note issues that are likely to be prompted by the very existence of this statement in the Act. One is, is it really necessary to state the principle in the constitutive document, given the fact that the doctrine is now part of customary international law? Assuming that it is codification and clarification of custom, does the wording “respect of borders existing on the achievement of independence” serve the purpose of clarification of the principle? Is it about borders existing on paper (*de jure*) or borders on the ground (*de facto*)? Does the word ‘independence’ include future likely break-ups of state not related to colonialism? Assuming that it is solely in connection with colonialism, is the document justified in giving so much life to the issue of colonialism? Why has not the document used the term *uti possidetis* so that it would be easy for interpretation for future disputes in light of several arbitral and judicial declarations and elaborations of the doctrine? All these issues would make the insertion of the statement problematic. Obviously these issues are beyond the enquiry of this paper. However, to the extent they coincide with the specific application of *uti possidetis* to Ethiopia-Eritrea dispute, these points may be assumed to have been considered.

⁶¹ Shaw, p 186

⁶² The Constitutive Act is the document that replaced the Charter of OAU. By this Act, the OAU is now defunct and transferred to African Union.

2.4 *Uti possidetis* under International Law

Having considered literature on *uti possidetis*, it is easy to discern the fact that the principle is not enshrined in a global document. With the exception of few treaty bodies that occurred in regional context, there is no multilateral treaty dealing with the issue of *uti possidetis*. Lack of such kind of treaty is understandable. Most states have either completed this stage of state formation or have skilfully handled the dispute bilaterally. Or the nature of the dispute may not warrant such kind of global action. Whatever the cause, the lack of universal treaty regime of *uti possidetis* opens the door to an important issue: has this doctrine reached the status of customary principle, apart from its customary nature in Africa (and Latin America), so that it has a binding effect on all states facing similar boundary disputes?

To answer this, we need to look at a selection of statements made on the matter by authoritative organs and individuals. The commonly cited documents to establish the customary nature (state practice and *opinio juris*) of *uti possidetis* are the 1960 UN declaration on the Independence of Colonial Peoples (Resolution 1514), the Cairo resolution, and the rampant arbitration *compromis* and practices of Latin American and African countries. The UN declaration states:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

As stated previously for similar wordings, this declaration was not an outright statement of *uti possidetis*. But still by using the terms of ‘national unity’ and ‘territorial integrity’, it may be argued, the declaration implicitly advocates the maintenance of *status quo* which is the main purpose of *uti possidetis*. The African and Latin American practices of providing *uti possidetis* in arbitration agreements, though not conclusive, may be taken as evidence for existence of custom beyond regional context. Moreover the Cairo resolution, which amounts to African custom, is also another indicator for emergence of international custom on the subject.

Having noted the UN Resolution and State practices, Ratner rightly argued that “the mere existence of *uti possidetis* in arbitration *compromis* or Resolution 1514 does not demonstrate *opinio juris*.”⁶³ But he does not totally deny the existence of the principle. He admits the probative value of the ICJ’s frequent assumption of *uti possidetis* as a customary law and says that at least it is a customary law in Africa and Latin America during the time of decolonization, if not for all-time.

ICJ, although not requested to decide upon the issue for *uti possidetis* was already accepted by the parties, never spared a moment from asserting that *uti possidetis* is a customary rule. In the Burkina Faso/Mali case, it said the following:

*The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.... Uti possidetis, ..., is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.*⁶⁴

In other cases presented before it, ICJ, noting its analysis of the concept in the just mentioned case, repeatedly asserted the customary nature of *uti possidetis*.⁶⁵ Therefore, as far as the application of the doctrine during decolonization is concerned, it is an accepted custom. In Cassesse’s words “whatever view is taken, it is beyond dispute that at present *uti possidetis* constitutes a general rule of international law.”⁶⁶

2.5 Recent Interpretation of *Uti Possidetis*

As explained above *uti possidetis* was propounded for situations where independent states were formed out of territories administered by colonial power(s). The core situation for its application has been decolonization. This framework of the original application of *uti possidetis* might lead one to suppose that the doctrine had relevance for decolonization and that, once territorial disputes associated with colonial heritage were dealt with, it would be

⁶³ Ratner, p 598

⁶⁴ Frontier Dispute, Para 23

⁶⁵ Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), Judgement of 11 September 1992, ICJ Reports 1992, p 386 ff

⁶⁶ Cassesse, p192

irrelevant. However, as recent events made it clear, the use of *uti possidetis* is no where to be over. Quite the contrary: its meaning has been broadened. It has been reinterpreted so that it would regulate boundary disputes that are occasioned by state dissolutions or break-ups, cases far removed from colonialism.

Case in point is the application of the principle in the recent separations and dissolutions of former socialist countries of Eastern Europe, which can be illustrated by the former Yugoslavia. The European Community Arbitration Committee (ECAC), established to tackle the legal issues associated with the break-ups of Yugoslavia, gave numerous opinions regarding the boundaries of the new States emerging from Yugoslavia. Faced with the issue of “can the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law,” the Committee answered in the positive. It said that the principle, i.e. *uti possidetis*, “applies all the more readily to the Republics” citing Article 5 of the Constitution of the former Yugoslavia, which it said, “stipulated that the Republics' territories and boundaries could not be altered without their consent.” More important is the Committee’s assertion that:

*Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of uti possidetis.*⁶⁷

This interpretation is a departure from the previous conception(s) of the doctrine. The issue then is has this reinterpretation passed into customary law in par with the traditional meanings of the doctrine?

In support of the doctrine’s application in a context other than decolonization, we can look at a European community declaration regarding recognition of the new East European States. As a precondition for recognition, the community set, inter alia, “respect for the inviolability of all frontiers which can only be changed by peaceful means and by common

⁶⁷ Opinion no. 3 of the European Community Arbitration Committee on Yugoslavia, appended in EJIL, p 184

agreement.”⁶⁸ Another support for this extended interpretation of *uti possidetis* comes from the ECAC. In its brief opinions, particularly in opinions 2 and 3, it has reflected on the subject. In opinion no. 2 it declared:

*Whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis de jure) except where the states concerned agree otherwise.*⁶⁹

In its third opinion, in which the principal issue was *uti possidetis*, the Committee, after citing a text from ICJ’s Frontier Dispute case to substantiate its own findings, affirmed that “*Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle.”⁷⁰ This meant the application of the principle extended to modern day of State break-ups that are not related to colonialism.

The Committee’s opinions were far from accepted. Commentators said that the Committee’s expansion of the ICJ’s decision is unconvincing and instead, they suggested, since regional differences in the application of international law are not unusual, the contextual disparity should be appreciated and the doctrine should not be used without modification.⁷¹ Moreover, in a formal sense, the opinions of the Committee were not binding on any of the States concerned. It was not created by virtue of an international arbitration agreement between disputing parties and did not have treaty base. Nevertheless its opinion may be treated as a non-binding yet authoritative statement of the relevant law.⁷²

Some writers, without asserting the customary status of the recent meaning of the principle, advocated its practical use for any break-up of a State. In support of *uti possidetis* with its new interpretation, Allian Pallet argued that “the people of former colonial countries were

⁶⁸ Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ (16 December 1991), annexed in 4 EJIL 1993 pp 72-73

⁶⁹ Opinion no. 2 of the Badinter Arbitration Committee, reprinted in 3EJIL (1992)(pp183-185)

⁷⁰ Ibid

⁷¹ Dugard, John, A Legal Basis for Secession: Relevant Principles and Rules, in Dahlitz, p 94

⁷² Craven, 334

wise to apply it; Europeans must not commit the folly of dispensing with it.”⁷³ From this, we may say that the extended meaning of *uti possidetis* is gaining acceptance, especially because of lack of an easy and order-centred substitution for the doctrine. However, unlike its traditional meaning associated with decolonization, it cannot be said that it has managed its way into customary international law. With the exception of few comments on the subject in connection with the East European countries, the new interpretation is not tested before international tribunals such as ICJ. Even the comments available are more of ought-to-be than of affirmation of custom. Whether this new interpretation will be established in the rubric of international law in the future remains to be seen.

2.6 Criticisms of *Uti Possidetis*

A number of commentators and writers have identified the weak sides of the principle. I will mention some of the problems that tend to relate to the progress of the thesis in the third and fourth chapters. These criticisms will later help us evaluate if the choice of the principle to Ethiopia and Eritrea is justified under the circumstances.

One of the principal problems of the doctrine is its failure to accommodate the principle of *self-determination* of people. As the doctrine tells us, its application is based totally on territory line we called *uti possidetis* line. It does not matter which people lived in this or the other side of the territory, which language these people speak, what culture they have, to which side they wish to pledge their allegiance, etc. Simply put the principle ignores peoples’ right of self-determination, which is of fundamental concern in the present state of international law. By its obsession with territorial *status quo*, it put “the destiny of the territory above the destiny of the people.”⁷⁴ Ratner also says that the extension leads to genuine injustices and instability by leaving significant populations both unsatisfied with their status in new states and uncertain of political participation there.⁷⁵ He also fears that,

⁷³ Pellet, Alain (1992) ‘the Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’ *3EJIL*, 182(1992), p180

⁷⁴ Castilino p. 75

⁷⁵ Ratner, 591

this principle, leaving people on the wrong side of the border, may lead to ‘ethnic cleansing’,⁷⁶, the worst violation of fundamental human and people’s rights.

The other criticism deals with the doctrine’s failure to appreciate the framework of its original use i.e. **decolonization** (and colonial documents). While originally it applied for boundaries marked by one colonial power or colonial powers that were more or less ‘equals’, it then extended for the application of treaty boundaries which were ‘imposed’ by colonial powers upon other countries. The Ethiopia-Eritrea case, as will be discovered soon, is a typical illustration. Unlike the documents used in most cases of *uti possidetis*, the treaties used for Ethiopia and Eritrea are not colonial in a sense that the colonial powers decided the boundaries by themselves. Rather they were made between a colonial power and a country that was prey to the colonial aspiration. Moreover, especially with its latest extension in meaning, the doctrine confuses colonialism with federation, independence (from colonialism) with state break-up, etc. As a matter of fact, the extension of *uti possidetis* to the present day state ‘break-ups’, cases which are almost unrelated to decolonization, is highly criticized. Ratner provides convincing arguments against this extension, one of which being the temptation of ethnic separatists to divide the world further along administrative lines.

Another problem is the choice between *uti possidetis de jure* and *uti possidetis de facto* is not settled. As explained earlier, the application of the principle depends on the selection of either of these interpretations of *uti possidetis*. However, the customary law does not make ranks between these two interpretations, which happen sometimes to be contradictory. In the event of contradiction, the solution for the dispute becomes unpredictable for both can justify totally different outcomes under customary law. Referring to this anomaly, a dismayed writer once said, “the doctrine of *uti possidetis* has proved to be so indefinite and ambiguous that it has become somewhat discredited even as a criterion for settling

⁷⁶ Ibid

boundary disputes between Latin American States.”⁷⁷ It may be possible to argue that the express agreement between the parties may rectify the problem. But this counter-argument misses the point. If the principle required piecemeal agreement for its clarity or enforceability, where is the customary nature of the doctrine?

Another failure of the doctrine that can be witnessed from hostile relations of some States is the fact that it has neither prevented the occurrence of *war* nor served for settlement of *boundary disputes* as often claimed to justify its application. This criticism is an attack against the original rationale for the use of the doctrine in international relations, namely order. Authorities such as the ICJ invoked the tendency of the principle to maintain order as the very reason for the principle’s appearance in international law and its development into its customary status. But, as Radan suggests, the principle has neither avoided border wars nor resolved boundary disputes. After counting border wars in Latin America and Africa, which the principle failed to prevent, Radan plausibly claims that it was the border wars and not the principle that resolved the boundary disputes.⁷⁸ The Ethiopia-Eritrea boundary dispute and the war that followed has been a contemporary example for the doctrine’s failure. The friendly application of the doctrine in the case of the Velvet Divorce between the Slovak and Czech republics may be presented as exemplary for the success of this doctrine. However, the peaceful dissolution of Czechoslovakia owes its success as much, if not more, to historical facts as to *uti possidetis*.⁷⁹ It may also be argued that the failure of the doctrine is due to cultural, historical and geographic factors associated with the disputed territories. But still the real cause is attributable to the principle for its near-total ignorance of factors just mentioned. Even as Dugard says, “the retention of historical and colonial boundaries [*uti possidetis*], which fails to take account of ethnic and historical realities, may be seen as the cause both of the failed State and of the continuing conflict in many States.”⁸⁰

⁷⁷ Fitzmaurice, Gerald (1954) *the Law and Procedure of the ICJ, 1951-4: Points of Substantive Law*, part 13, p 325

⁷⁸ Cited in Castellino, p. 194

⁷⁹ Castellino, p 19

⁸⁰ Dugard, in Dahlitz, p95

Ratner also suggests that the seemingly clear solution the *uti possidetis* seemed to offer prevented any debate over the adjustment of boundaries and limited the ***universe of possible borders*** to one. This problem, according to this same writer, emanated from the unwarranted assumption by States of its applicability from the outset.⁸¹ If this is true, the doctrine has impaired the development of stable, readily justifiable and more acceptable solutions for the age-long disputes over territory.

Another problem is the doctrine's complete failure to settle disputes when it is not possible to establish the *uti possidetis* line. Normally the doctrine presupposes the existence of a certain ***boundary line***, which in actual circumstances may not be ascertained no matter what, owing to lack of evidence or other factors. This problem may be mitigated if the doctrine is supplemented by or substituted for other legal principles. But judging from cases involving this principle, including the Ethiopia-Eritrea dispute, this problem and its solution are not given sufficient thought.

A related criticism is about the ***critical date***. As pointed out above, without settled critical date it is a futile attempt to solve a boundary dispute on the basis of *uti possidetis*. The customary law seems to demand the parties' agreement on the critical date. But the parties may fail to agree upon this date. For such an instance it is doubtful if the customary law has a ready solution. By looking at similar cases, it may be argued that the critical date supplied by custom is the time of independence. However this time is open for interpretation. And this remains, as will be elaborated for our case later, the biggest impediment to the drawing of the *uti possidetis* line, which must be marked based upon the fixed critical date.

Another challenge, a fatal one if it succeeds, is whether the concept is really a ***customary*** international law. As stated above, many authorities, including the ICJ, have asserted the customary status of *uti possidetis*. However, arguments against this assertion are not easy to overlook. A certain Lapradelle, while recognizing the practical importance of the doctrine,

⁸¹ Ratner, p 591

advocates the rejection of “*uti possidetis* as a valid principle of international law.”⁸² Leaving aside arguments on the basis of lack of required elements for formation of custom, it is possible to present plausible argument by simply looking at the components of *uti possidetis*. The silence of the custom about *de facto* / *de jure* interpretation and the critical date, which are fundamental to the principle’s application, and its dependence on the agreement of the parties to decide on such matters all lessen, if not destroy, the customary force of the principle.

⁸² Cited in McEwen, p 30

3 *Uti possidetis* in the Territorial Dispute between Ethiopia and Eritrea

3.1 Introduction

The background of the Ethiopia-Eritrea boundary dispute is outlined in the first chapter. So is the concept of *uti possidetis* in the second. For the kind of boundary dispute Ethiopia and Eritrea faced, a question may be posed as to the principal legal rules that would provide a final and stable solution. *Uti possidetis*, self-determination, and equity are some of them. Having considered the particular circumstances of the case, which of these principles or others, if any, would best serve for the boundary issue antagonizing the two countries? It is not so much that I would propose the best principle and would substantiate it with arguments. Rather I would evaluate whether the choice of *uti possidetis* to Ethiopia-Eritrea boundary dispute was relevant or adequate for the determination of the dispute. With this objective in mind, I will first note the coming into picture of this legal principle in the boundary issue. Afterwards I will inquire whether the circumstances of the case justify the application of the rule. Issues to be considered include the critical date for the boundary dispute, the relevance and adequacy of the colonial treaties, and the implication of secession for *uti possidetis*.

3.2 *Uti possidetis* to Ethiopia-Eritrea Dispute

3.2.1 The Background to the Algiers Agreement*

As will be discovered soon, the Algiers Agreement bears prime responsibility for the application of *uti possidetis* in Ethiopia-Eritrea dispute. However there are a number of other documents that substantially contributed to the insertion of the concept in the Algiers Agreement. A brief discussion of them follows.

* Unless otherwise stated, the documents cited in this section are reprinted and can be found in Walta Information Center (2001), *Chronology of the Ethio-Eritrean Conflict and Basic Documents*”

It seems that the idea of *uti possidetis* first appeared in the Recommendations made by Rwanda and the United States, by the document's reference to colonial treaties. Immediately following the outbreak of Ethiopia-Eritrea conflict, the governments of Rwanda and the US started facilitation meetings between the two countries. Rwanda and the US, due to their close ties with the contending parties, were invited by both governments, to principally mediate and search for common grounds with the aim of finding peaceful solution for the dispute.⁸³ The peaceful resolution in mind, US and Rwanda submitted six-point recommendations so that the parties accept the recommendations "in an official and legally binding manner". As stated in the document, the parties, among other things that were mainly intended to dissipate the military crisis at the time, were supposed to commit themselves to "seeking the final disposition of their common border, determined on the basis of established *colonial treaties* and international law applicable to such treaties."⁸⁴ (Emphasis added).

Why the facilitators (US and Rwanda) inserted the reference to colonial treaties from the start is not stated in the Recommendations. From the shuttle diplomacy undertaken by the facilitators and from consultations conducted with the parties, it is possible to assume that Ethiopia and Eritrea, though still unclear whether they both (or at least the Ethiopian government) were aware of the full extent of its meaning, must have wanted colonial treaties to be the governing documents. The insertion of this clause in the document, as it will be clear later, will have enormous repercussion for it more or less determined the final content of the peace deal regarding the issue of boundary. As a matter of fact, however, the Recommendations alone were not successful due to lack of acceptance by both parties at the beginning and later by Eritrean suspicion towards some elements of the document.⁸⁵ It should be noted however that the initial failure of the Recommendations was not as such related to the issue of colonial treaties or boundaries. Most of its failure was in connection

⁸³ Press Statement, US Department of State, June 3, 1998

⁸⁴ Recommendations from the Facilitators on Eritrea and Ethiopia Dispute, 1 June 1998, no. 1, Para.3.& no. 3, Para.2

⁸⁵ Negash, p 58

with the proposed redeployment of Eritrean forces to positions held before May 6, 1998 and the return of Ethiopian civil administration.⁸⁶ This indicates that colonial treaties were not opposed by the parties.

Within few days after the Recommendations and mainly due to lack of assent to it, the Council of Ministers of OAU “appeals” to the two countries to “accept and implement the Recommendations of the Facilitators.”⁸⁷ This heralded the transition of the mediation process from the Facilitators to the institutional mechanism of OAU. Soon enough the highest organ of OAU took over the matter. On June 10 1998, OAU HSG passed a resolution on the Facilitators Recommendation. The resolution, having endorsed the decision made by the Council of Ministers, appeals to the parties to “accept and implement the Recommendations of the facilitators,” in the same words as the Resolution passed by the Ministers.⁸⁸ Here it is possible to see how the unilateral initiative taken by US and Rwanda gained institutional backup. Mere reference to the Recommendations meant that OAU gave its unconditional support to the initiative including the reference to colonial treaties. By fully endorsing the facilitators’ recommendations, both resolutions (of the Ministers and HSG) have paved the way for colonial treaties to govern the border dispute. In addition, it was decided, in the latter resolution, to send to Ethiopia and Eritrea the high level delegation of HSG of the Central Organ.

This delegation comprised of the President of Burkina Faso (chair of the delegation and the chairman of OAU), Heads of State of Djibouti, Zimbabwe, Rwanda (later withdrew because of its involvement in the initial phase of the mediation), and the Secretary General of the OAU.⁸⁹ The delegation visited both countries and made extensive discussions with them both. Although it spent enormous amount of time and energy, the delegation could not broker a progress towards realization of peaceful resolution since Ethiopia and Eritrea

⁸⁶ Ibid

⁸⁷ OAU Council of Ministers Resolution on Facilitators Proposal, 5 June 1998.

⁸⁸ Resolution of OAU Heads of State and Government on Facilitators Recommendation, 10 June 1998

⁸⁹ Report on the Efforts Made By OAU High Level Delegation on the Dispute between Ethiopia and Eritrea, 17-18 December 1998.

insisted on their initial positions.⁹⁰ Given the high personalities involved, people with the highest responsibility in their States, the delegation could not continue its work on that level. Instead, in furtherance of the delegation's mission, a Committee of Ambassadors was established, with the main purpose of collecting information and views from the two countries or any other international organization.⁹¹ At the end of its mission, the Committee of Ambassadors drafted a comprehensive report that it presented to the Ministerial Committee of the High Level Delegation.⁹² The Ministerial Committee, after its own meetings and contributions, approved the report, observations and recommendations made by the Committee of Ambassadors.⁹³ At last, the High Level Delegation, having considered and endorsed the works of the two committees and having examined the position of the parties, submitted a set of proposals, called OAU Framework Agreement for a Peaceful Settlement of the Dispute between Eritrea and Ethiopia.

The Framework Agreement, proposed after months of consultations, fact-findings and ascertainment of views, had an explicit and elaborate reference to the principle of *uti possidetis*. The document declared for the parties' consideration of several principles with the aim of finding a peaceful solution for the conflict. One of the principles having relevance for our case reads:

*respect for the borders existing at independence as stated in Resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964 and, in this regard, determine them on the basis of pertinent colonial Treaties and applicable international law, ..., in the case of controversy, resort to the appropriate mechanism of arbitration.*⁹⁴

As will be seen later, this paragraph of the Framework Agreement is substantially the same with the boundary clause in the Algiers' Agreement. This similarity of wording shows the influential role played by this document in determination of *uti possidetis* as the solution for the boundary dispute. Several factors explain the strength of this proposed agreement.

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

⁹⁴ OAU Framework Agreement For a Peaceful Settlement of the Dispute Between Eritrea and Ethiopia, 8 November 1998

One is the source: it is issued by Heads of State and Government. Two, it was immediately approved by the Central Organ of OAU, which some say is a sort of “African Security Council.” Moreover it did not take long before it garnered the support of important institutions such as the UN Security Council and the European Union. Another is the parties’ unilateral acceptance of the Framework Agreement, which they made after numerous clarifications were given to them regarding issues that they raised towards the proposals.

It should be noted here that the Framework Agreement explicitly invokes the Cairo resolution. As will be seen later, this resolution has been another influential document in the use of *uti possidetis* to our case. Its principal influence comes from its customary status in Africa, which is discussed in the second chapter.

Legally speaking, the recommendations, resolutions and proposals of OAU organs referred above are not binding upon the parties. As is the nature of most decisions by African organs, imposition of obligations upon the parties is beyond the organs’ power.⁹⁵ It is no wonder that the resolutions were of substantially appeals directed to the parties, who retained the final power. Moreover, these resolutions did not provide clear terms which would have been easy to see if the parties voluntarily complied. They were abstract terms that were open to manipulation. But still the influence they exerted on the final content of the parties’ obligations in the Algiers agreement is noticeable. Evidently the boundary clause of the Algiers Agreement is a verbatim copy of the Framework Agreement. From the number of clarifications⁹⁶ requested by both parties regarding terms in the Framework Agreement, it seemed that significant part of the Framework Agreement and in effect the Algiers Agreement was done by OAU. Given both countries’ firm desire to obtain the support of the international community, which OAU was the immediate candidate for its

⁹⁵ Sands, Philippe and Pierre Klein(2001), *Bowett’s Law of International Institutions*, 5th ed., p 246. Except decisions on the internal affairs of the organs, even resolutions by the highest organ did not have binding effect. But with the new Constitutive Act, it is argued that some decisions may have legally binding effect, a fact which must be tested in the future.

⁹⁶ Report on OAU Efforts

direct and indirect role, it should not surprise one if the parties were eager to embrace a clause proposed by this organ.

The OAU's institutional undertakings were not isolated incidents in suggesting colonial terms for the solution of the boundary dispute. The matter, due to its destabilizing effect in the peace and security of the region and in effect to the whole world, might have been debated in several international forums. The EU and the UNSC are two of the international arenas. In this regard, a resolution by the SC can be mentioned. The SC, with the view of expressing its "strong support for the decision of the OAU" and discharging its responsibility under the Charter, passed a resolution "welcoming" the parties' "official statements" regarding:

*delimiting and demarcating their common border on the basis of a mutually agreeable and binding arrangement, taking into account the Charter of the OAU, colonial treaties, and international law applicable to such treaties.*⁹⁷

But still the matter was substantially left for OAU, because, supposedly, regional endeavour was the best avenue for such matters and the dispute was already under consideration by this continental organ.

3.2.2 The Algiers Agreement

The immediate source for the application of *uti possidetis* to Ethiopia and Eritrea boundary dispute is the Algiers agreement. The content of the agreement, as stated previously, is greatly influenced by works of OAU. In other words it is a culmination of the peace initiatives taken first by US/Rwanda and then by OAU. At the time, the agreement was hailed as a cure for every aspect of the border crisis: a solution for cessation of hostilities, for investigation of the origins of the conflict, for observance of international humanitarian law, for settlement of claims against one another, and, related to this paper, for setting the ground rules and principles for settlement of the boundary. It might or might not have achieved its multi-faceted goals envisaged in the Agreement. But at least for delimitation

⁹⁷ UN Security Council Resolution Calling on Eritrea, Ethiopia to Cease Hostilities, 26 June 1998

and demarcation issues, the answer does not seem to be promising. For its inability to resolve the boundary dispute at least temporarily, political and personal factors might take their share of the blame. But can the *uti possidetis* clause in the Algiers Agreement provide any meaningful, let alone stable and permanent, solution as may be hoped for from a boundary resolution?

Article 4 of the Agreement is destined for boundary issues. The three most relevant paragraphs of this Article read:

1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions ex aequo et bono.

15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as territorial integrity and sovereignty of the other party.

As can be gathered from these provisions, the Cairo resolution with its mantra of borders existing at independence is enshrined. The colonial treaties of 1900, 1902, and 1908 are also enumerated to serve as bases for implementation of the Cairo resolution. These two, the resolution and the colonial treaties, cemented the complete application of *uti possidetis* to Ethiopia and Eritrea. In addition, the usual clause of “applicable international law,” which opened the room for international rules such as the laws of treaty, is inserted. In an

attempt to limit the discretion of the Commission, the parties ruled out the application of *ex aequo et bono*. The effect of the award and finality of the Commission's findings are also provided.

Due to the implication they have in my later discussion of alternative principles, a note should be made of two points. One is the meaning of "applicable international law" and two the lack (or existence) of alternative principles in the Algiers Agreement. With regard to the first, it is possible to argue for both restrictive and broad interpretations of the phrase "applicable international law." The restrictive approach may be taken to refer to the use only of rules of interpretation of treaties. This view was held by Ethiopia in its pleadings before the Commission. However, the Commission, citing a similar holding by ICJ, rejected Ethiopia's contention and held that the phrase included "rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of conduct of the parties."⁹⁸ This holding may be taken as the broad interpretation of the phrase. The reference to "applicable international law", for the Commission, is not only of rules for interpretation of the colonial treaties but also of rules on other documents or actions as having impact upon border disputes.

Which of these two meanings was intended by the parties? The answer may depend on the authority of the Commission. Given the personalities of the members of the Commission and the involvement of the UN in some of the affairs of the Commission such as appointing its Secretary, it may be said that the Commission's finding should be authoritative. If that is so, the broader interpretation should be used. There is another support for the broader approach. In the clarification given by OAU for a similar phrase in the Framework Agreement, it was said that "international law would refer to the specific aspects of the international law relevant to the colonial treaties."⁹⁹ This clarification, an important part of the mediation process leading to the Algiers Agreement, is relevant to ascertain the intent of the parties. This response by the OAU, though not wholly clear, seems to be compatible

⁹⁸ Delimitation Decision, p 24

⁹⁹ OAU's Response to Issues Raised by the Eritrean Side Requiring Clarification [on the Framework Agreement], 26 January 1999

with interpretation given by the Commission. Unfortunately the Commission's argument has not left any indication as to the use of OAU's interpretation which has direct relevance on the basis of Article 32 of the Law of Treaties. Beyond these two approaches, it is also possible to introduce a third and even broader interpretation of the phrase that includes any international law principle to be used in case of inadequacy of the treaties. Plebiscite can be taken as an illustration. Judging from the documents preceding the Algiers agreement, however, it is difficult to say that the parties intended such interpretation.

As to the second point, apart from the broader interpretation argument, there is nothing in the Algiers Agreement that would allow application of other competing or supplementary legal rules other than *uti possidetis*. As stated in the previous paragraph, the broader interpretation cannot be justified under either the preparatory works of OAU or official statements made by the parties. On the contrary, the parties' explicit exclusion of *ex aequo et bono* from the Commission's power may be an evident testimony to the fact that only colonial treaties were intended by the parties. Therefore legal principles such as plebiscite, since they are not related to colonial treaties, have been out of the legal principles within the Commission's power.

3.2.3 *Uti Possidetis*: Custom or Clause in the Algiers Agreement?

It is important to clarify at this point of the formal source of the principle to our dispute. The issue is: is it because of its customary status or because of its provision in the Algiers Agreement that the principle is used in the boundary dispute? There is no denying of the consensual element of *uti possidetis*. Eritrea and Ethiopia have agreed to it in the Algiers Agreement. As a result *pacta sunt servanda*, the pillar principle of treaty law, would bind them. This is the line followed by the Boundary Commission. As far as it is concerned, the inclusion of the clause in the Agreement seemed to be the only factor that mattered. Unlike other tribunals, typically ICJ, which went to great length to find the customary status of the principle, the Commission said little about its customary status under international law. This line of judgment is in conformity with the very judicial propriety: determination of what is in issue. Since the parties were not disputing the customary status and since there

was no need for them to do otherwise for they apparently agreed on the principle, it was unnecessary for the tribunal to have dealt with the matter.

But this line should not obscure the fact that the principle at the beginning was embraced by the two parties because of its customary status, mainly emanating from the Cairo resolution. This Cairo resolution of maintenance of “territory acquired at independence” is viewed by many to be the driving force behind *uti possidetis* in the Ethiopia-Eritrea border dispute, forcing itself as custom first into mediation efforts, then into the series of resolutions and proposals and finally into the Algiers Agreement. Even it may be argued that since the principle has been a binding custom, the parties were left with no choice except to abide by *uti possidetis* envisaged in the Cairo resolution. This resolution forms part of customary international law and as a result, theoretically speaking, binds the parties.

But this second line as well may be objected. In actual terms the legal force of the principle depends upon its pertinence to the dispute we are trying to analyze. This issue of relevance will be explained later. For now it is sufficient to note that the principle, with the help of its customary status, was enshrined in the Algiers Agreement, thereby becoming the foundation for the resolution of the boundary dispute between Ethiopia and Eritrea.

3.3 The Challenges against *Uti Possidetis* in Ethiopia-Eritrea Boundary Dispute

Having outlined its formal sources, I will go now to the inquiry of the relevance and adequacy of *uti possidetis*. By considering factors necessary for application of this principle, is the selection of *uti possidetis* as a sole legal basis a wise decision for settlement of the boundary dispute? Other than echoing its importance during decolonization, sufficient justification has not been given for the application of *uti possidetis* as the prime, and only, solution for the boundary dispute of Ethiopia and Eritrea.¹⁰⁰ Likewise no provision has been made to rectify for any eventual failure of the

¹⁰⁰ To the writer’s knowledge there is no meaningful analysis of *uti possidetis* made by the parties before (or after) its appearance in the Algiers Agreement. From this fact it is possible to assume that the parties have not

principle. These facts may explain why the use of the principle to Eritrea and Ethiopia suffers from a number of problems and challenges. The next sections will outline challenges that can be mounted against *uti possidetis* for our case.

3.3.1 Secession and *Uti possidetis*

The main problem of the boundary clause in Algiers Agreement is its failure to see the boundary dispute in light of secession. Although some, mostly for political reasons, like to argue for Eritrea's independence from foreign domination (i.e. Ethiopia) insinuating the existence of colonial relationship between Ethiopia and Eritrea, the case of Eritrea's independence is nothing other than a classic case of secession outside the colonial context.¹⁰¹ This confusion might have arisen from inability or unwillingness to make distinction between decolonization of Eritrea from Italy in 1942 and secession of Eritrea from Ethiopia in 1993. After Eritrea was liberated from Italy, it was federated with Ethiopia by the decision of UNGA. This makes any association of colonialism with Eritrea-Ethiopia relationship at best unconvincing. The Eritrean struggle for liberation had nothing to do with the issue of foreign domination. Like any other separatists, the claim of the liberation movements in Eritrea was secession.

If this is so, the use of the principle to the Ethiopia-Eritrea dispute would be out of context. As discussed in the second chapter, the application of *uti possidetis* presupposes decolonization. In the absence of this context, the use of the principle requires a whole new justification. It may be argued that the principle is now applied with its latest interpretation. However, this argument is not sound. One, the modern interpretation does not have customary power under international law and as a result cannot be justified on legal grounds. Two, the modern interpretation, unlike the Algiers Agreement, does not retroactively go back and provide for colonial or similar ancient documents. It simply

fully understood (or not cared to understand) the principle and the factors associated with it as elaborated and applied by international tribunals such as the ICJ.

¹⁰¹ Crawford, James (2006), *the Creation of States in International Law*, 2nd ed., p391

maintains the administrative boundary as existed at the time of separation or break-up, irrespective of the mechanism by which the administrative boundaries were drawn.

3.3.2 The Colonial Treaties and *Uti Possidetis*

The principal assumption in the application of *uti possidetis* seems to be a firm belief that the issue of the boundary dispute is the issue of colonialism, i.e. the issue that remained unresolved during the colonial times and that this issue must be resolved having resort to colonial treaties. True after Italy declared the colony of Eritrea, it concluded handful of treaties with Ethiopia that supposedly would delimit the boundaries between Ethiopia and the colony of Eritrea. Those treaties, namely the treaties of 1900, 1902, and 1908, were named in the Algiers Agreement as the colonial treaties that would resolve the dispute. According to the Boundary Commission (and a mere glance at the treaties will tell the same), the treaties were destined for central, western and eastern sectors of the boundary. From the spirit of the border clause and the explicit enumeration of these treaties in the Algiers Agreement, these treaties must have been believed to be of the utmost relevance and comprehension for all boundaries of the two countries. But an issue arises when the colonial treaties decide the dispute. Is the boundary dispute between Ethiopia and Eritrea necessarily a question of colonial boundaries, calling for colonial treaties?

There are two possible underlying considerations that must have led the parties to the Algiers Agreement to make the fullest use of colonial treaties. The first consideration is in connection with the validity and relevance of the treaties to the boundary dispute; and the second is related to the clarity and adequacy of the treaties.

To begin with the first, the parties, when they provided for the three colonial treaties, might have thought that the treaties were still valid or had some kind of relevance. Treaties, depending on circumstances, may be valid and regulate a given situation. As stipulated in the law of treaties, their validity and relevance depends on several factors ranging from circumstances of formation to circumstances affecting their continuity. The colonial treaties at hand must be evaluated on the bases of such circumstances. After the formation of those

colonial treaties and up to the establishment of the new Eritrean State, several events have occurred that had implications on the life and relevance of those treaties. These events include Italy's invasion and occupation of Ethiopia, the GA Resolution for the federation of Eritrea with Ethiopia, and the unilateral annulment of the treaties by Ethiopia. Italy's invasion of Ethiopia, which was contrary to those treaties, obviously amounted to unilateral and unlawful abrogation of the treaties. This unlawful abrogation was a sufficient reason to invalidate the treaties. In addition, the GA, having considered the wishes of Eritrean people, economic interests of Ethiopia and regional stability, decided to federate Eritrea with Ethiopia, effectively avoiding the treaties once and for all. Moreover the unilateral abrogation by Ethiopia of the treaties, justified under the circumstances, effectively prevented the invocation of those treaties. All these factors played their roles to make the colonial treaties irrelevant. Therefore using those same treaties, which were nullified long upon a time, would be contrary to reality and contrary to the life of treaties.

The other assumption, which might have caused great inconvenience to the Commission, is the assumption that the treaties are clear and sufficient to resolve the boundary dispute. On the contrary the treaties and the map attached to one of the treaties were too vague to supply a solution for most of the boundaries. This fact is repeatedly stated in the delimitation decision of the Commission and elsewhere.¹⁰² To overcome this problem the Commission, justifying itself on the basis of the phrase "applicable international law", investigated or examined several documents, maps, official documents, that were neither attached to nor parts of the treaties. As a matter of fact almost all of these documents were made by Italy, or people that had allegiance to Italy. Given the lack of professionals in the field (cartographers, etc) on the other side, i.e. Ethiopia, it should not come as a surprise if there were no documents (especially maps and graphic descriptions of boundaries) from the Ethiopian side. The end result is the decision of the Commission has much to do with what the Italians thought to be the Italian territory and not what the colonial treaties said about the territory. This may be the reason why the Ethiopian authorities later changed their minds and resorted to all sorts of clarifications, negotiations, etc, which, in the eyes of

¹⁰² Delimitation Decision pp 33, 43, and 50 and Negash pp. 23 & 24

Eritrean government and indeed the Commission too, are violations of the finality agreement stipulated in the Algiers agreement.

Incidentally one may wonder as to the correctness or fairness of the Commission's doing in taking as evidence documents that are found from Italy.¹⁰³ Does interpretation of a treaty justify using all sorts of documents, declarations, maps, memos, etc of one of the parties only, though they are remarkably absent from the other source? Given the historical facts that Italy was colonial power and it occupied Ethiopia, indicating colonial aspiration on the part of Italy, it is difficult to conquer with the Commission's so much use of those one-sided maps, conducts, etc. However, the Commission may not be to blame for it is restricted in the legal principles it could use to resolve the dispute. If it did not make use of those documents substantially made by Italy or Italians, it would be hard to see how it could have rendered any meaningful decision, given the inconsistency and misrepresentation presented by the treaties and the maps, and given *ex aequo et bono* was out of its reach. Equity as existed in law would not have helped the Commission. As explained by a certain writer, equity as it existed in law is very narrow to fill so much a gap left by the colonial treaties and *uti possidetis*.¹⁰⁴

3.3.3 *De facto / De jure Uti Possidetis*

The other problem of the boundary clause in the Algiers Agreement is its failure to clearly identify the choice between the two lines of *uti possidetis*, namely *de facto* and *de jure*. In majority of cases these lines converge and it may not be necessary to choose one over the other. However a problem arises where the two lines diverge. In Ethiopia-Eritrea case, the difference between the *de facto* line and *de jure* line (if at all ascertained from the colonial treaties), is documented.¹⁰⁵ If this is true the choice between the two lines must have been

¹⁰³ The use of such documents is conspicuous throughout the Commission's decision. An example can be the use of a map prepared by Italian geographer, Captain Enrico de Chaurand, in 1894. The Commission uses this map to understand the ambiguous (to say the least) lines of territory made by the 1900 Treaty and the Map attached to it. Delimitation Decision, p34.

¹⁰⁴ Castellino, p 136

¹⁰⁵ Negash, pp 23, 25

made before actually using *uti possidetis*. As a matter of fact, the Algiers Agreement does not seem to recognize the problem of *de facto* and *de jure* classification. For this reason, the stipulation of the principle in the Algiers Agreement has missed the fundamental component of the principle.

From its enumeration of the colonial treaties, it may be argued that the parties have chosen the *de jure* line, in effect ignoring *de facto* control. Basically there is nothing inherently wrong in choosing one over the other. But what is the justification for choosing *de jure* over *de facto* line? When a choice is made, it must be justified on the basis of either evidentiary matters, expediency, weight of authorities, etc. Likewise choice of *uti possidetis de jure* by the Algiers Agreement needs to be reasonable. Given the inconsistency, inadequacy and ambiguity seen in the colonial treaties and accompanied documents, it is hard to understand the choice of *de jure* line for the boundary dispute. On the contrary, *de facto uti possidetis* would have been the better option. This is so because actual administration of territory could be ascertained from both sides. Especially from the Ethiopian side, actual administration must have been the only way to ascertain its territory at the time.

It may be argued that before any neutral determination of these lines, it is not possible to say this line is preferred to the other. However the inadequacy and ambiguity of most of the terms of the treaties have been well-known way before the boundary dispute. Moreover the Algiers Agreement could have opened the room for the use of both principles giving the discretion to the Commission to choose either of the two for part or all of the boundaries depending on circumstances. If it was so, the Commission could have used the evidence of *de facto* possession at least in cases where the *de jure* line (i.e. the line based on the colonial treaties) is not clear or non-existent, instead of going to unjustified length to interpret the colonial treaties.

It should also be noted that the Commission makes the point of the possibility of using subsequent practice or conduct of the parties to vary the lines drawn on the basis of the

treaties.¹⁰⁶ This may seem to embrace *de facto uti possidetis* in the proceedings. But the point of the Commission is not to resort to *de facto* lines on the critical date rather it is to accommodate changes in provisions of treaties by the parties' conduct or practice. This is in line with the principles of treaty law. The practices become parts of the colonial treaties in effect making use of *de jure* line throughout its decision.

3.3.4 The Critical Date

Determination of the critical date is another fundamental element of *uti possidetis* that went wrong in Eritrea-Ethiopia boundary dispute. In the application of this principle, there has to be a determination of the time on which the *uti possidetis* line 'freezes' and will delineate the boundaries. From the Algiers Agreement, one may read the critical date to be the time of independence. The question then is when is the time of independence? Is it 1991(3) when Eritrea declared itself to be independent State, independent from Ethiopia? Or is it 1942, the time when Italy, the colonial power, lost control over the territory of Eritrea?

As has happened during decolonization, time of independence from colonialism of Eritrea from Italy may be a candidate. But after the passage of so much time and the occurrence of so many factors already mentioned such as Eritrean federation with Ethiopia, little justification exists to take this independence date as the critical date. Retroactivity, which is to be pursued if this date is selected, is in contradiction with *uti possidetis*. The other candidate is the time of secession of Eritrea from Ethiopia. Given the very idea of *uti possidetis*, i.e. maintenance of the *status quo*, it is this date, the date that caused the present independent status of Eritrea, which may be considered the critical date. If at all *uti possidetis* should be used for the border crisis, this should be the critical date to determine and maintain the territorial possessions of these two countries.

The latter date, at least in the eyes of the Boundary Commission, seems to be the date envisaged in the Algiers Agreement. The Commission, by way of interpretation of the

¹⁰⁶ Delimitation Decision p 22

phrase “existing at independence”, stated that the date, although it does not use the word critical, is 27 April 1993, the time of independence of Eritrea from Ethiopia.¹⁰⁷ But with the choice of this date a bigger problem lingers on: incompatibility of this date with the colonial treaties (colonial boundaries). While the critical date, determined by the Commission, is not in any way related to colonialism, the colonial treaties are. This is the main anomaly in determination of the critical date in our case: fixing the critical date to be a certain point in time and providing as legal basis documents that are far removed from that date. This confusion seems to be reflected in the Commission’s delimitation decision. Irrespective of the Commission’s finding of that date, it is hardly reflected in the final decision. All the Commission’s legal analysis centred on the colonial treaties (and other documents and actions during colonial times) that happened almost a century before the said time of independence. Naturally, following the Agreement that established it, the Commission left no indication to give any degree of weight to the legal or factual possessions as existed at the time of independence, which *uti possidetis* would have demanded.

In light of this argument, it is easy to see how the critical date is identified for symbolic purposes only and how it has no effect whatsoever in actual application of *uti possidetis* and in the outcome of the boundary decision. On the contrary the time of Italy’s departure from Eritrea seems to be the real critical date for the dispute. As I explained above making this date critical is contrary to *uti possidetis*.

3.4 Conclusion

The use of *uti possidetis* to Ethiopia-Eritrea dispute as explained in the previous sections is fraught with difficulties. Fundamental elements required for its application were not sufficiently defined. A principle with such fundamental problems should not have been used as a solution. If *uti possidetis* had to be used, the parties could have at least removed

¹⁰⁷ Delimitation Decision, p 12

those challenges raised and could have set remedies in advance for eventual failures of the doctrine.

The problem was exacerbated by the alleged effect of the principle in actually dividing same communities and towns bordering Ethiopia and Eritrea. Unfortunate as this situation is, the blame falls upon the shoulder of the governments of both countries. At least they could have left the Commission some room to avoid such situations. Instead they went very far to exclude *ex aequo et bono* from the Commission's legal tools. With this constraint, the phrase of "applicable international law" served no purpose except for the use of materials, practices, etc. that led to results which might not be accepted. The division of same people or town is nothing other than the worst fear of many scholars who have persistently objected the uncritical application of *uti possidetis*.

One may be tempted to praise the past mediation efforts of the OAU in resolving the boundary crisis. But all those efforts seem to lose credit in their incorporation of unsubstantiated principle of *uti possidetis* that has done nothing but keep the boundary crisis alive. The organization, or States that acted on behalf of it, could have tried to research the proper application of the principle for the special circumstances of Ethiopia and Eritrea. The fact that the principle has been a custom under international law cannot serve as an excuse. Its customary nature arguably has always required clarifications of the fundamental elements for each individual case, clarifications that barely appear in Eritrea-Ethiopia case.

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4 Recommendations

4.1 Introduction

In the previous chapters, I have tried to elaborate the concept of *uti possidetis* and my main thesis that this principle is not either relevant or adequate to the border dispute. In this chapter, basing myself on my observations of the boundary dispute and the solution sought for, I will provide recommendations. In addition to suggesting alternative solutions, the recommendations, without losing track of the dispute, would give general points that could have been helpful for solving Eritrea-Ethiopia boundary dispute and the tragedy ensued. Here it is not my intention to cite authorities to support my points. Rather I take this opportunity to make statements that I feel are commendable for Ethiopia-Eritrea or similar other boundary disputes that are likely to happen in our world mostly in Africa, a place where, despite international trends to the contrary, boundary disputes remain crucial.

4.2 The Relevance of *Uti Possidetis* for Territorial Disputes

The simplicity of the *uti possidetis* rule, as writers suggested, is arguably its most important feature and there may still be concerns that favour the retention of this rule in international law. But this does not mean that every time boundary issues arise, the wisdom of its application should not be challenged. Especially its old colonial application, unless there are still pending territorial disputes, should be minimized. The rationale for its immediate application does not exist any more. States, these days, are required to get calm, reason and resolve their territorial disputes peacefully. States should not be expected to go to war due to mere existence of a territorial dispute. It was the imminence of war that led to *uti possidetis*. In the absence of such fear of war, opportunities must be explored, especially opportunities that fully take into consideration the rights of people occupying the territory.

During decolonization, apart from the urgent need for order, vast areas of territory were unoccupied and territorial division based on *uti possidetis* may not have implications on human lives. But now, the fact is that most frontiers falling under such kinds of disputes are occupied. Any decision as to the territory affects residents. It is not a simple demarcation of land; it is about people as well. As an ICJ Judge once suggested “it is for the people to determine the fate of the territory and not the territory the fate of the people.”¹⁰⁸ As a result, the application of *uti possidetis*, the strict application of which does not allow such kind of human consideration, should be rethought.

By this I do not mean that the concept is totally useless. As recent events suggest, state break-ups may not be avoided. Reasons may be the resurgence of nationalism, differences in ideology, religion, and language, self-determination, and the sheer size of a State, which may all cause separation and dissolution. For such events, *uti possidetis* may be used as starting point, without playing a decisive role. It may in all cases be used as a provisional remedy, as it were in its original Roman law, until final settlement is reached on the basis of other acceptable principles.

4.3 Alternatives to *Uti possidetis*

Inadequacy or irrelevance of *uti possidetis* does not wither away the boundary disputes to which the principle has been invoked. In the absence or insufficiency of *uti possidetis*, alternatives must be forwarded. Here I will mention and only mention some of the competing legal principles that I believe would and should replace or supplement *uti possidetis* for the present and similar other boundary disputes. Plebiscite, *ex aequo et bono*, and *uti possidetis* as redefined in modern times are possible candidates.

¹⁰⁸ Western Sahara, International Court of Justice, Advisory Opinion of 16 October 1975, ICJ Reports 1975, Separate Opinion of Judge Dillard

Plebiscite, “a public referendum or vote by the population of a territory to determine its choice of a sovereign or a cession of territory to another state,”¹⁰⁹ is one possible option that could be used in place of *uti possidetis*. There are obviously undisputed territories on both sides. For the disputed boundaries, instead of resorting to ancient treaties that are fraught with ambiguity, the people residing in the disputed areas could be given the opportunity to choose the side to which they desire to owe allegiance. This will be in accordance with the basic principle of self-determination. Plebiscite, though in the context of a non-self-governing territory, has not always been permitted in segments of territory for fear of “a rupture of the integrity of the ‘territory’ as a whole.”¹¹⁰ In our case, however, the issue of territorial integrity is not at stake. Before determination in authoritative way of the exact territory, there will not be violation of territorial integrity. So at least in areas where *uti possidetis* fails for evidentiary or other reasons, plebiscite could be the best solution.

Ex aequo et bono is another principle that could have helped resolve the boundary dispute. It “refers to the way in which an international tribunal can base its decision not upon conventional law but on what is just and fair to the parties before it.”¹¹¹ Of course in the Algiers Agreement it is stated that the Commission does not have the power to decide on the basis of *ex aequo et bono*, depriving it of an important legal instrument. The Commission, given the opportunity, might have resorted to it instead of using one-sided documents for the interpretation or understanding of the colonial treaties. The need for this principle is nowhere more conspicuous than in its Demarcation Directions of 8 July 2002. In the directions it is stated:

Division of towns and villages

*A. The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both parties.”*¹¹²

¹⁰⁹ Oxford Dictionary

¹¹⁰ Crawford, 620

¹¹¹ Oxford Dictionary

¹¹² Cited in the Commission Observations

Uti possidetis as reinterpreted and applied in recent times may as well be another possibility for the boundary dispute. As explained before, the application of *uti possidetis* to Ethiopia-Eritrea has no less to do with consent of the parties than its binding customary nature. After all the custom is of no *jus cogens* character and can be derogated by the consent of the parties. So arguably they could have agreed to the latest interpretation and provided for the *uti possidetis* as existed at the time of Eritrean secession which might have avoided the present stalemate. However the implication of this interpretation for the future, i.e. inviting secession on the line of administrative boundaries, should always be countered.

It may be argued that these alternatives are not acceptable for there is no international law principle that allows the use of these alternatives for border disputes like our case. But again its customary power is not the only reason why *uti possidetis* is used in Ethiopia-Eritrea boundary dispute. Rather the application of *uti possidetis* to the case has strong consensual element. Likewise the application of these alternatives could have been brought to the case by agreement.

Finally, the above list is no where to be exhaustive. Other legal or political solutions that embrace concerns such as *economic interests* and *geographical unity* may be envisaged. Even *joint ownership* (joint sovereignty) over the disputed territory may well be an ideal solution. What is important is that all these possibilities should be explored while maintaining good faith and reason throughout. As already stated, the simplicity and availability of *uti possidetis* should not block our search for these and other sound legal principles that could accommodate over-riding concerns of humanity.

4.4 Contextualization of the dispute

One may wonder what the situation between Ethiopia and Eritrea would be if the territorial dispute was seen in light of African unity. Would the war be necessary if it were reasoned that one day the boundary would not matter due to economic or political unity among African States? The main problem of Ethiopia-Eritrea boundary dispute, I believe, is obsession with immediate delimitation and demarcation. At one time, it seemed that unless

the boundary was demarcated overnight, the world for both countries would be over. But boundary issue is one single issue among several others that exist among bordering countries. The weight we accord to those issues decides the search for their solutions. If we portray the people on the other side of the territory as rivals or as having nothing to do with one another, this is likely to be a cause for unjustified and unnecessary pursuit for a piece of land. On the contrary, if we underline the interdependence of peoples and the importance they have for one another, it is likely that the boundary dispute will not take the spotlight.

The issue at hand is regional integration in the context of AU or other sub-regional association or even bilateral integration. In this context, and even in the general idea of globalization, it matters little whether a piece of territory is on the Eritrean or Ethiopian side. It is noteworthy to remember the historical roots for the formation European Union: establishment of interdependence and avoidance of possibilities of war.

Given lack of solidarity on basic issues such as human rights among government officials, it is unlikely for realization of that dream of African unity in the near future. But still this is the possibility given the commitment of people that have the leverage to make such kinds of decisions. At least there is a ready possibility for some kind of union between neighbouring countries like Ethiopia and Eritrea, which among other things share history and culture. If this is the case, there is no need to escalate a territorial dispute, which is to the disadvantage of both countries. If an Eritrean is allowed, because of such a union, to go and work in Ethiopia and an Ethiopian is given the same opportunity, a destructive war is barely necessary over a land which can be exploited for the advantage of both.

The tendency is territorial issues are losing their significance. Economic and other concerns are getting priority. As a result it is unnecessary and sometimes destructive to construct a wall to simply mark territory, the doing of which means nothing more than the rhetoric of sovereignty and territorial integrity. The obsession with immediate demarcation, emanating from the obsession with sovereignty and territorial integrity, should be weighed down. It may be important to demarcate one's territory. But the solution of it should not be at

unbearable cost to humanity. The general purposes of humanity that are reduction of poverty and promotion of human rights are best served in the context of brotherhood, unity and solidarity.

4.5 Informed Decision

As can be gathered from the circumstances surrounding the conclusion of the Algiers Agreement and implementation of its provisions, both countries, at least the Ethiopia government, did not seem to have made informed decision. The clarifications both countries demanded about documents which supposedly were drafted on the basis of their wishes indicate mostly that they did not have much control over their own will. The desire of both countries to win the hearts and minds of the international community was obvious from statements they used to make regarding the dispute. However, the solution for everlasting issues like territory should be on the basis of reason and persuasion. Which means the solution must be sought within the countries themselves, which should decide on the basis of reason and their responsibility to their peoples and not because of their eagerness to please the international community.

This uninformed decision seems to be the reason why the enforcement of the boundary decision, years after the Algiers Agreement and the Commission's ruling, is not in sight. The OAU initiatives provided for *uti possidetis* and the parties agreed. Except the request for clarifications regarding colonial treaties, no challenge was raised against the application of the principle. The result is that the principle at the moment is helping no one. So it would be in the interest of all, including the international community, to reach at a permanent resolution, which can be obtained through informed decision of the parties and not through undue influence imposed upon them.

4.6 Identifying the Real Problem

As observers suggested, although there is no denying that boundary has been an important issue between Ethiopia and Eritrea, the immediate causes for escalation of the dispute had

to do with economic relations and ideology. This may explain why the parties, despite a number of mediation efforts, African and otherwise, went to war. If this is true, talking about boundary while the real issue is another will not bring a solution. So the real cause of the border crisis or at least a factor that led to the war should have been identified and dealt with. If it were so, may be, the boundary problem would not be a problem at all as it was not in the years that followed Eritrean secession.

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